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**Topor Contracting, Inc. and International Union of Operating Engineers, Local 17.** Case 3-CA-24557

September 19, 2005

**ORDER DENYING MOTION**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on November 14, 2003, the General Counsel issued the complaint on May 19, 2005, against Topor Contracting, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On July 26, 2005, the Acting General Counsel filed a Motion for Default Judgment with the Board. On July 27, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response.

**Ruling on Motion for Default Judgment**

We deny the Acting General Counsel's motion because the Acting General Counsel has failed to prove service of the complaint or the Motion for Default Judgment on the Respondent. The Acting General Counsel's motion alleges that the complaint was served upon the Respondent by certified mail. In support, the Acting General Counsel has attached to his motion various documents. We find, however, that the documents do not establish that the complaint and other correspondence from the General Counsel and Acting General Counsel were sent to the Respondent's correct address.<sup>1</sup>

The charge states that the Respondent's address is 153 Fillmore Avenue, Buffalo, New York, 14210. The affidavit of service attached to the charge, however, states that it was served on the Respondent at 153 Fillmore Avenue, Buffalo, New York, 14207.

Further, the affidavit of service attached to the complaint states that it was served on the Respondent by certified mail, return post office receipt requested, at 153 Fillmore Avenue, Buffalo, New York, 14207; 153 Fillmore Avenue, Buffalo, New York, 14210; and 143 Fill-

more Avenue, Buffalo, New York, 14207. In addition, the Acting General Counsel has attached to his motion copies of two letters, dated June 8 and July 1, 2005, advising the Respondent that a complaint against it had issued, that no answer had been filed, and that unless the Region received an answer by June 15 and July 8, 2005, respectively, a motion for default judgment would be filed. The June 8 letter was sent by certified mail to the Respondent at 153 Fillmore Avenue, Buffalo, New York, 14210; 143 Fillmore Avenue, Buffalo, New York, 14210; and 851 Eagle Street, Buffalo, New York, 14210. The July 1 letter was sent by certified mail to the above addresses, and also to 153 Fillmore Avenue, Buffalo, New York, 14207.<sup>2</sup> The Acting General Counsel did not submit return post office receipts for the complaint or the reminder letters, and there is no indication in the papers before us whether these documents were actually delivered or returned by the Postal Service.

Finally, the Acting General Counsel did not submit an affidavit of service with the Motion for Default Judgment. Section 102.24(a) of the Board's Rules and Regulations states that all motions filed with the Board shall be accompanied by an affidavit of service on the parties.

In view of the inconsistencies in both the street addresses and zip codes to which the General Counsel and Acting General Counsel have sent documents to the Respondent, the absence of return post office receipts or any indication whether the documents were delivered or returned by the Postal Service, the Acting General Counsel's failure to submit an affidavit of service of the Motion for Default Judgment, and considering the Respondent's *pro se* status, we find that the Acting General Counsel has failed to demonstrate that service of the complaint and Motion for Default Judgment was perfected.

Accordingly, we deny the Acting General Counsel's motion, without prejudice to its renewal when it can be demonstrated that the Respondent has been properly served with the complaint and Motion for Default Judgment.<sup>3</sup>

<sup>2</sup> The July 1 letter was also sent by regular mail. There is no indication in the papers before us whether it was actually delivered or returned by the Postal Service. Compare *I.C.E. Electric, Inc.*, 339 NLRB 247 fn. 2 (2003) (the failure of the Postal Service to return documents sent by regular mail establishes actual receipt).

<sup>3</sup> It will not be necessary to establish that the Respondent actually received these documents; all that is required is sufficient evidence that service was perfected at the Respondent's correct address. See *CCY New Worktech, Inc.*, 329 NLRB 194 (1999).

<sup>1</sup> The record does not show that the Respondent has been represented by counsel during these proceedings.

Dated, Washington, D.C. September 19, 2005

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Robert J. Battista,	Chairman
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Wilma B. Liebman,	Member
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Peter C. Schaumber,	Member
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